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APR 23 2008

MEMO ENDORSED

April 22, 2008

6 to him from PL re: whether he wants to amend his complaint (re: DA Morgenthau + / or in any other way) before we get to motion practice. 2-3 pp letter served + filed by PL by 4/28/08 @ noon.

SO ORDERED:
Date: 4/24/08
Richard M. Berman, U.S.D.J.

BY HAND

Hon. Richard M. Berman
United States District Judge
United States Courthouse
40 Centre Street
New York, New York 10007

Re: Dr. Paul Selinger, et al. v. City of New York, et al., 08 Cv. 2096 (RMB)

Your Honor:

I am the Assistant District Attorney assigned to the above captioned-matter, in which Robert Morgenthau, the New York County District Attorney ("DA Morgenthau") is named as a defendant. I plan to file a motion to dismiss the complaint against DA Morgenthau pursuant to Federal Rule of Civil Procedure 12(b)(6) because, even under the liberal standards that apply to evaluating such a complaint, it fails to state a claim against DA Morgenthau upon which relief may be granted. In accordance with Your Honor's Individual Court Rule 2(A), I respectfully request a pre-motion conference on this motion.

In this federal civil rights action brought pursuant to 42 U.S.C. § 1983, as well as New York state law, plaintiff seeks money damages and alleges that he was a successful dentist who was wrongfully prosecuted for insurance fraud. In 2005, plaintiff was indicted by a New York County Grand Jury, but in March 2007 the charges against plaintiff were dismissed prior to trial (Complaint ¶¶123-29). As against DA Morgenthau, plaintiff is seeking to hold him liable for conducting "several press conferences" during which plaintiff's arrest and indictment were discussed (Complaint ¶¶ 91-93). Plaintiff also seeks to hold DA Morgenthau liable for "advance[ing], further[ing], support[ing] and order[ing] the malicious prosecution" of plaintiff (Complaint ¶ 94). These are the sum total of the complaint's factual allegations describing the allegedly tortuous conduct of DA Morgenthau.

Plaintiff's complaint alleges that all "defendants," including, presumably, DA Morgenthau, are liable under the following § 1983 causes of action: false arrest (Complaint ¶¶ 131-34); abuse of process (Complaint ¶¶ 135, 138); malicious prosecution (Complaint ¶¶ 135-37, 139); and defamation (Complaint ¶¶ 136, 140). Plaintiff also advances state law claims against DA Morgenthau for malicious prosecution (Complaint ¶¶ 157-67), abuse of process (Complaint ¶¶ 171-85), and negligence (Complaint ¶¶ 189-204). My reasons for moving to dismiss the complaint pursuant to Rule 12(b)(6) are as follows:

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(1) Plaintiff's complaint does not allege that DA Morgenthau played any role in effecting his arrest. Nor can any such allegation be made in good faith. As such, it is clear that plaintiff has no § 1983 claim sounding in false arrest against DA Morgenthau. See generally Farrell v. Burke, 449 F.3d 470, 484 (2d Cir. 2006) ("It is well settled in this Circuit that personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983.") (internal quotes and citation omitted).

(2) Insofar as plaintiff's § 1983 claims for abuse of process and malicious prosecution are brought against DA Morgenthau in his official capacity as a public prosecutor, plaintiff has failed to state a viable clause of action. A state actor sued in his official capacity is not a "person" subject to liability under § 1983, see Will v. Michigan Dept. of State Police, 491 U.S. 58, 71 (1989), thus any federal official capacity suit against DA Morgenthau for his actions as a public prosecutor is facially deficient. See Gan v. City of New York, 996 F.2d 522, 529, 536 (2d Cir. 1993).

(3) Insofar as plaintiff is pressing these claims against DA Morgenthau in his individual capacity, they also fail. Plaintiff's claims for abuse of process and malicious prosecution are predicated upon events that purportedly occurred during the prosecution of the criminal charges against plaintiff. As such, those causes of action against DA Morgenthau are barred by absolute prosecutorial immunity. See Imbler v. Pachtman, 424 U.S. 409 (1976); Shmueli v. City of New York, 424 F.3d 231, 236-39 (2d Cir. 2005); Day v. Morgenthau, 909 F.2d 75, 77 (2d Cir. 1990). Plaintiff's state law claims for malicious prosecution and abuse of process are similarly barred by prosecutorial immunity. See Arteaga v. State, 72 N.Y.2d 212, 217 n.1 (1988); Drakeford v. City of New York, 6 A.D.3d 302 (1st Dept. 2004).

(4) Plaintiff likewise has no claim against DA Morgenthau based upon his alleged statements during the press conferences. According to plaintiff, those statements were "defaming" (Complaint ¶ 136), and were detrimental to plaintiff's "professional and personal reputations" (Complaint ¶ 92). But it is well settled that a claim sounding in defamation is not actionable under § 1983, Paul v. Davis, 424 U.S. 693, 701 (1976), since the Constitution does not protect an individual's reputation. Siegert v. Gilley, 500 U.S. 226, 233 (1991); see also Valmonte v. Bane, 18 F.3d 992, 1001 (2d Cir. 1994).

(5) Plaintiff's state law negligence claim fails for the simple reason that New York law does not recognize any negligence cause of action arising from a criminal investigation or prosecution. Johnson v. Kings County District Attorney's Office, 308 A.D.2d 278, 284-85 (2d Dept. 2003); see also Bernard v. United States, 25 F.3d 98, 102 (2d Cir. 1994) (describing New York law).

(6). Finally, because plaintiff has no viable claim against DA Morgenthau, it necessarily follows that plaintiff's wife has no derivative claim against him for loss of consortium or the like. See Hazel v. Montefiore Med. Ctr., 243 A.D.2d 344, 345 (1st Dept. 1997); Mehtani v. New York Life Ins. Co., 145 A.D.2d 90, 95 (1st Dept. 1989); see also Wahhab v. City of New York, 386 F. Supp. 2d 277, 292 (S.D.N.Y. 2005) ("§ 1983 does not support derivative claims for loss of consortium").

Based on the foregoing, I respectfully request that the Court grant a pre-motion conference on DA Morgenthau's motion to dismiss. Presently, DA Morgenthau's deadline to respond to plaintiff's complaint is April 30, 2008.[1] To allow Your Honor an opportunity to schedule a pre-motion conference, I would request that DA Morgenthau's time to respond to the complaint be extended until 45 days after the Court conducts its pre-motion conference.

Thank you in advance for your consideration.

Respectfully submitted,

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(by mail)

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[1] Since plaintiff effected service pursuant to N.Y. CPLR § 308(2) and filed his proof of service on March 19, 2008, service was deemed completed on March 31, 2008 (the tenth day, March 29th, being a Saturday). Because plaintiff's summons demanded a response to the complaint within 30 days of service, DA Morgenthau's response is currently due on April 30, 2008.